

Appeal of JULIA ZALAMAN from action of the Board of Education of the Katonah-Lewisboro Union Free School District and Superintendent Robert J. Roelle regarding termination of employment.

Decision No. 15,953

(July 23, 2009)

James R. Sandner, Esq., attorney for petitioner, Wendy M. Star, Esq., of counsel

Ingerman Smith, L.L.P., attorneys for respondents, Susan E. Fine, Esq., of counsel

Huxley, Interim Commissioner.--Petitioner appeals the determination of the Board of Education of the Katonah-Lewisboro Union Free School District ("respondent board" or "board") to terminate her employment. The appeal must be dismissed.

Petitioner was granted tenure as a teacher by the Elmsford Union Free School District ("Elmsford") in September 1983. In September 2001, petitioner began working as a substitute teacher in the Katonah-Lewisboro Union Free School District ("district") in the middle and high schools.

In May 2005, petitioner applied for a position as a teaching assistant in the district. By letter dated June 14, 2005, the assistant superintendent offered petitioner a position as a teaching assistant with a three-year probationary period, effective September 1, 2005. Subsequently, on August 29, 2005, petitioner completed an employment application. Under "teaching experience," petitioner indicated that she had been an art teacher for grades K-12 in Elmsford for 20 years. The application did not request information about previously acquired tenure.

By letter dated April 29, 2008, the superintendent informed petitioner that he intended to recommend to the board at its June 5, 2008 meeting that petitioner's probationary appointment be terminated effective June 30, 2008. On June 5, 2008, the board adopted a resolution terminating petitioner's employment effective June 30, 2008. This appeal ensued. Petitioner's request for interim relief was denied.

Petitioner contends that she was entitled to a shortened probationary period of two years pursuant to Education Law §3012(1)(a) because she had previously acquired tenure in Elmsford. Petitioner argues, therefore, that as of September 2007 she acquired tenure by estoppel. Petitioner contends that as a tenured employee, the board may not terminate her employment without a due process hearing pursuant to Education Law §3020-a. Petitioner also asserts that respondents had notice of her prior tenure status. She seeks a return to her teaching

assistant position with full back pay and benefits. She also seeks costs and attorneys' fees.

Respondents contend that the petition fails to state a claim upon which relief can be granted. They deny that petitioner is entitled to, or obtained, tenure by estoppel or is entitled to reinstatement.

They assert that petitioner's alleged status as a prior tenured teacher does not entitle her to a shortened probationary period as a teaching assistant. They further deny that they had any notice of petitioner's alleged prior tenure status and assert that petitioner never submitted any proof of such status before receiving counseling regarding her performance in the fall of 2007.

Initially, I must address a procedural issue. The purpose of a reply is to respond to new material or affirmative defenses set forth in an answer (8 NYCRR §§275.3 and 275.14). A reply is not meant to buttress allegations in the petition or to belatedly add assertions that should have been in the petition (Appeal of a Student with a Disability, 46 Ed Dept Rep 540, Decision No. 15,589; Appeal of E.P. and D.P., 46 *id.* 390, Decision No. 15,542; Appeals of Cass, et al., 46 *id.* 321, Decision No 15,521). Therefore, while I have reviewed petitioner's reply submissions, I have not considered those portions containing new allegations or exhibits that are not responsive to new material or affirmative defenses set forth in the answer.

Petitioner contends that she is entitled to tenure by estoppel. Tenure by estoppel "results when a school board fails to take the action required by law to grant or deny tenure and, with full knowledge and consent" permits an employee to serve beyond the expiration of the probationary term (Matter of Gould v. Bd. of Educ. of Sewanhaka Cent. High School Dist., et al., 81 NY2d 446; citing Matter of Lindsey v. Bd. of Educ. of Mount Morris Cent. School Dist., et al., 72 AD2d 185). To determine whether petitioner is entitled to tenure by estoppel, I must first determine the correct length of her probationary term.

Education Law §3012(1)(a) provides in pertinent part:

Teachers and all other members of the teaching staff of school districts, ... shall be appointed by the board of education ... for a probationary period of three years, ... provided, however, that in the case of a teacher who has been appointed on tenure in another school district within the state, ... the probationary period shall not exceed two years (emphasis added).

Petitioner contends that for purposes of tenure and seniority rights under Education Law, the term "teacher" includes teaching assistants as well as other professional educators. She asserts, therefore, that because she is a teacher who was previously appointed on tenure in another district, she is entitled pursuant to Education Law §3012(1)(a) to a two-year probationary period for any subsequent

appointment, including an appointment as an teaching assistant. Contrarily, respondents assert that since petitioner was appointed as a teaching assistant, not a teacher, the language of Education Law §3012(1)(a) is inapplicable.

The term "teacher" has different meanings in various contexts in the Education Law. The Court of Appeals has found that for the purposes of the abolition of positions and lay offs, seniority protection afforded tenured teachers also applies to teaching assistants, who serve in the special subject tenure area of teaching assistant (Matter of Madison-Oneida BOCES v. Mills, et al., 4 NY3d 51). The court stated that "in order to have an internally consistent interpretation between tenure track statutes, statutes of appointment (§3012[1][a]; §3014[1]) must have a parallel interpretation with statutes of abolition (§§2510, 3013[2])" (Matter of Madison-Oneida BOCES v. Mills, et al., 4 NY3d 51, 58).^[1] The Appellate Division, Second Department has also determined that a teaching assistant is entitled to tenure by estoppel under Education Law §3012 when she had worked full time for six years with knowledge of the board beyond the three-year probationary period (Walters v. Amityville UFSD, 251 AD2d 590).

The Appellate Division, Third Department, however, recently considered the tenure status of teaching assistants vis-à-vis teachers in determining eligibility for a reduced probationary period. In Matter of Putnam Northern Westchester BOCES, et al. v. Mills, et al. (46 AD3d 1062), the court held that a newly appointed BOCES teacher was not entitled to a reduced probationary period although she held prior tenure as a teaching assistant. The court held that the statutory "language [of Education Law §3014] does not specifically provide that the reduced probationary period should be available to teachers previously tenured in nonteaching positions" (Matter of Putnam Northern Westchester BOCES, et al. v. Mills, et al., 46 AD3d 1062, 1063). In that case, the court's focus was on the previous tenure area, and the court distinguished the "drastically different" duties and qualifications between teaching assistants and teachers, ultimately denying a reduced probationary period for a teacher who held previous tenure as a teaching assistant.

In that case, the court interpreted the word "teacher" in the context of a reduction in the probationary period for prior service under Education Law §3014, a statute that uses language identical to the language of Education Law §3012(1)(a) at issue here: "in the case of a teacher who has been appointed on tenure in another school district within the state" (emphasis added). The court concluded that "the legislative intent of Education Law §3014 is to shorten the probationary period only for those teachers who have previously attained tenure *as teachers* [citations omitted]" (Matter of Putnam Northern Westchester BOCES, et al. v. Mills, et al., 46 AD3d 1062, 1065). In the instant case, while petitioner had previously attained tenure as a teacher, her subsequent appointment was as a teaching assistant, not as a teacher. The same word in a statute cannot have

two different meanings depending on the context (see McKinney's Cons Laws of New York, Book 1, Statutes §236)[2]. Thus, in light of the court's holding in Matter of Putnam Northern Westchester BOCES, et al. v. Mills, et al. (46 AD3d 1062), I find that §3012(1)(a) is inapplicable to petitioner. Accordingly, she is not entitled to a reduced probationary period and she did not receive tenure by estoppel.

In light of this disposition, I need not address the parties' remaining contentions. However, as a final matter, I note that the Commissioner has no authority to award monetary damages, costs or reimbursements in an appeal pursuant to Education Law §310 (Appeal of F.P., 46 Ed Dept Rep 134, Decision No. 15,465; Appeal of J.F. and D.F., 45 id. 241, Decision No. 15,310).

THE APPEAL IS DISMISSED.

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[1] The operative language of Education Law §§3012(1)(a) and 3014(1) reducing the probationary period to two years "in the case of a teacher who has been appointed on tenure in another school district within the state" is virtually identical; the distinction is that §3012 applies to school districts other than city districts, whereas §3014 applies to boards of cooperative educational services (BOCES).

[2] That section provides: "In the absence of anything in the statute indicating an intention to the contrary, where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout, and the same meaning will be attached to similar expressions in the same or a related statute."

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